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U.S. Department of the Treasury
Attention: Thomas Feddo, Assistant Secretary for Investment Security
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Mr. Feddo:

Thank you for the opportunity to comment on the proposed rule to replace the current regulations at 31 CFR Part 800 ("Part 800") and the proposed rule to establish new regulations at 31 CFR Part 802 ("Part 802") to implement the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"). We provide comments on both proposed rules below. A number of our comments under Part 800 apply to parallel provisions in the proposed rule for Part 802, and we request that they be considered with respect to Part 802 as well.

Similar to the comments we provided on the interim rule regarding the Committee on Foreign Investment in the United States ("CFIUS") Pilot Program, the vast majority of our comments are requests for clarification. We thank the U.S. Treasury Department for considering our Pilot Program comments and for responding to several of them through Pilot Program FAQs and/or through the proposed rules for Part 800 and Part 802. We repeat those Pilot Program comments that are applicable to the current proposed rules but that have not yet been addressed or clarified.

We look forward to the U.S. Treasury Department's response.

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PART 800

"Completion Date"

1. In the new definition of "completion date," please clarify whether the references to "covered control transaction" and "covered investment" are meant to qualify "the *earliest* date upon which any ownership interest, including a contingent equity interest, is conveyed, assigned, delivered, or otherwise transferred to a person."

Specifically, in the context of multi-tranche equity investments (which are common in venture capital and other early-stage investments where future tranches are conditioned on the satisfaction of performance milestones), is the closing of the first such tranche the "completion date" (including for purposes of the 30-day advance filing requirement for mandatory filings), *even if* "control" or the non-passive rights/access/involvement that would constitute a "covered investment" do not attach at the closing of the first tranche?

If this is the approach that CFIUS will take, in the context of mandatory filings, it would have the effect of requiring a filing at least 30 days prior to a closing that would not itself constitute a "covered control transaction" or "covered investment." It would also appear to foreclose a practice that developed under the CFIUS Pilot Program, whereby part or all of the equity portion of an investment closes first, but "control" or other non-passive rights do not attach until at least 45 days after submission of a declaration to CFIUS. The reason this practice developed is so that foreign investors can provide urgently needed funding to a U.S. business, while not obtaining any of the "control" or non-passive rights that could potentially create a national security concern until the Pilot Program's 45-day advance filing requirement has been fulfilled. Foreclosing this practice could further disadvantage foreign investors vis-à-vis domestic investors in a bid process and limit urgently needed capital infusions for struggling U.S. companies. If neither "control" nor the non-passive rights of a "covered investment" attach at the first closing, what national security rationale compels CFIUS to define "completion date" with respect to the earliest date that an ownership interest is transferred?

If this is not the approach that CFIUS means to take, it would be helpful to revise the definition of "completion date" to make this explicit. For example:

> The term *completion date* means, with respect to a transaction, the earliest date upon which (i) any ownership interest, including a contingent equity interest, is conveyed, assigned, delivered, or otherwise transferred to a person that could result in a covered control transaction or covered investment, or (ii) a change in rights that could result in a covered control transaction or covered investment occurs.

"U.S. Business"

2. Please clarify whether the scope of "U.S. business" has changed.

We note that the proposed rule revises the definition of "U.S. business" to delete the following limitation:

> The term *U.S. business* means any entity, irrespective of the nationality of the persons that control it, engaged in interstate commerce in the United States~~, but only to the extent of its activities in interstate commerce~~.

We note that the Discussion to the proposed rule indicates that this deletion was made to conform the definition in Part 800 with the definition in FIRRMA. But we also note that a related example has been deleted from 800.301:

> ~~Corporation A, a foreign person, owns businesses both outside the United States and in the United States. Corporation B, a foreign person, acquires Corporation A. The acquisition of Corporation A by Corporation B is a covered transaction with respect to Corporation A's businesses in the United States.~~

While the deletion of the above example suggests that CFIUS might consider non-U.S. operations/activities of a foreign-organized company to be part of the "U.S. business," the proposed rule *retains* Example 1 under the definition of "U.S. business," which suggests that only the U.S. operations/activities of a foreign-organized company would constitute the U.S. business:

> Corporation A is organized under the laws of a foreign state and is wholly owned and controlled by a foreign national. It engages in interstate commerce in the United States through a branch or subsidiary. *Its branch or subsidiary is a U.S. business*… (emphasis added)

Given these conflicting signals, we request clarification on whether the change to the definition of "U.S. business," and/or the deletion of the example from 800.301, change the scope of what CFIUS will consider to be a "U.S. business." It is important to know this, because the scope of the "U.S. business" impacts the scope of the "covered control transaction" or "covered investment," which in turn impacts the scope of the risks posed by such transactions that CFIUS can legitimately use as the basis for mitigation and/or a block recommendation.

Specifically, we request clarification on the following:

- For a foreign-organized company that does business both abroad and in the United States, would the "U.S. business" (if any) be limited just to the operations/activities that the company conducts in the United States?

- And separately but relatedly: for a U.S.-organized company that does business both in the United States and abroad, would the "U.S. business" be limited just to its operations/activities in the United States?

3. Please confirm that the criteria used to determine whether a target is a "TID U.S. business" should be assessed only to the extent of the target's "U.S. business," rather than with respect to all of the global operations of the target. We raised a similar question in the Pilot Program context, but saw no response, so we repeat a specific scenario in the TID U.S. business context. This scenario arises often in our practice, and would benefit from clarity so that we can properly advise clients, especially in the mandatory filing context.

> **Example A**: Corporation A, a foreign person, proposes to acquire Corporation B, a foreign person. Corporation B's non-U.S. operations collect sensitive personal data of U.S. citizens, but its U.S. operations do not collect or have access to such data. Corporation B's U.S. operations consist solely of two sales representatives who market Corporation B's products to U.S. customers and, if trouble-shooting or repair is needed for any such products, refer the U.S. customers to the appropriate technicians at Corporation B's foreign offices. Corporation B is not involved with any critical technology or covered investment critical infrastructure. All product design, manufacturing, and servicing takes place outside of the United States. Assuming no other relevant facts, the U.S. business of Corporation B **[is][is not]** a TID U.S. business.

TID U.S. Business – Affiliates, Subsidiaries, Minority Investments and Joint Ventures

4. Please explain why the definition of "unaffiliated TID U.S. business" is limited to *direct* holdings, and what implications that has for transactions that might be "covered investments." We appreciate the note in the Discussion to the proposed rule that this definition intends to exclude those "entities in which the foreign person already holds a majority of the voting interest or the right to appoint the majority of the entity's board or equivalent governing body" (page 14). But "holdings" can be direct or indirect, so we would like to understand further the rationale for expressly limiting the qualifying holdings to *direct* holdings of voting interest. Alternatively, we suggest that 800.250 be revised to say "a TID U.S. business in which that foreign person does not directly *or indirectly* hold more than 50 percent of the outstanding voting interest…"

We had also posed specific scenarios for clarification in the context of our Pilot Program comments, but saw no response, so we repeat them here in the TID U.S. business context:

Example B: Corporation A, a foreign person, directly wholly owns Corporation B. Corporation B holds a 60 percent voting interest in Corporation C, a TID U.S. business. Corporation A proposes to acquire an additional 10 percent direct voting interest in Corporation C. For purposes of the analysis under 800.211, the "foreign person" is Corporation **[A][B]**, and Corporation C **[is][is not]** an "unaffiliated TID U.S. business."

Example C: Corporation A, a foreign person, currently directly holds a 60 percent voting interest in Corporation C, a TID U.S. business. Corporation A proposes to acquire an additional 10 percent voting interest in Corporation C, but to make the investment indirectly through its direct wholly owned subsidiary, Corporation B. For purposes of the analysis under 800.211, the "foreign person" is Corporation **[A][B]**, and Corporation C **[is][is not]** an "unaffiliated TID U.S. business."

5. Please confirm whether an investment which affords a foreign person membership or observer rights on the board of a company that has a subsidiary TID U.S. business would be considered within the scope of 800.211(b)(2). Consider the following:

Example D: Corporation A, a foreign person who is not an excepted investor, proposes to acquire a four percent, non-controlling equity interest in Corporation B. Corporation B is a foreign person that wholly owns and controls Corporation C, an unaffiliated TID U.S. business. Pursuant to the terms of the investment, a designee of Corporation A will have the right to observe the meetings of the board of directors of Corporation B. Corporation A is not entitled to any specific rights with respect to Corporation C as a result of the transaction. Assuming no other relevant facts, the proposed transaction **[is][is not]** a covered investment.

6. Please clarify the extent to which the activities of a U.S. business's minority investments and/or joint ventures should be considered for purposes of the definition of "TID U.S. business." What criteria should be used to determine if the technologies, functions, or data collection of minority investments and/or joint ventures should be imputed to the U.S. business? Consider the following examples:

Example E: Corporation A is a U.S. business. Corporation A itself does not produce, design, test, manufacture, fabricate, or develop any critical technology. Corporation A has a 50-50 joint venture with Corporation B. The joint venture is a U.S. business that manufactures critical technology. Assuming no other relevant facts, Corporation A **[is][is not]** a TID U.S. business.

Example F: Corporation A is a U.S. business. Corporation A holds a 15 percent, non-controlling interest in Corporation B. Corporation A itself does not produce, design, test, manufacture, fabricate, or develop any critical technology. Corporation B, however, is a U.S. business that manufactures critical technology. Assuming no other relevant facts, Corporation A **[is][is not]** a TID U.S. business.

Example G: Same facts as in Example F, except Corporation A holds a 15 percent controlling interest in Corporation B. Assuming no other relevant facts, Corporation A **[is][is not]** a TID U.S. business.

TID U.S. Business – Covered Investment Critical Infrastructure

7. We welcome the level of specificity provided in the proposed Appendix A to Part 800 regarding "covered investment critical infrastructure" and functions related thereto. However, 30 calendar days is insufficient time to research and consider the implications of each of the 28 proposed types of covered investment critical infrastructure and the functions associated with each. Therefore, we are not in a position to offer specific comments on this Appendix, and **request that the time period for submission of comments on Appendix A and related provisions in the Part 800 proposed rule be extended**. We believe that particular attention to this Appendix is warranted, given that it appears to be heavily skewed towards businesses that directly or indirectly form part of the defense industrial base.

Appendix A to Part 800 would also benefit from a dedicated covered investment critical infrastructure page on the Treasury Department's CFIUS website that contains, at a minimum, direct links to (and ideally, direct postings of) the most recent versions of the specific statutes, regulations, and other authorities referenced in Appendix A regarding types of "covered investment critical infrastructure."

TID U.S. Business – "Sensitive Personal Data"

8. We generally believe it is necessary to have more examples pertaining to "sensitive personal data," particularly given the newness of the concept and expansiveness of the definition. **We have the following specific questions on which we would be grateful for clarity**:

- It appears that the collection or maintenance of genetic information of any amount, and on any population of U.S. citizens, would make a U.S. business a "TID U.S. business," regardless of whether or not such genetic information can be used to distinguish or trace an individual's identity (such as if aggregated or anonymized). Is this a correct understanding? If so, what analysis did CFIUS perform of the potential number and types of U.S. companies, particularly biotech companies, that could be considered a TID U.S. business based on this prong of the definition of "sensitive personal data"? It would seem vastly larger than the mere 576 small businesses estimated to potentially be impacted by the proposed rule.

- For identifiable data in the relevant categories collected or maintained at any point over the preceding 12 months, should any consideration be given to the length of time that such data is in the U.S. business's possession? Should parties count all identifiable data that a U.S. business holds, for example, for less than one day, one hour, one minute, etc.?

- *Example 2* to 800.247 indicates that "operat[ing] a facility on the premises of a U.S. military facility" amounts to targeting or tailoring services for purposes of 800.241(a)(1)(i)(A). This, however, would seem to capture purely commercial businesses that happen to have locations on the premises of military facilities but are not otherwise focused on military customers (e.g., a franchise of a coffee shop chain). Is "targets or tailors" meant to capture any business that happens to operate on the premises of a military facility, even if its business activities at such facility are substantially the same as its business operations outside of U.S. military facilities? If so, what analysis did CFIUS perform of the potential number and types of U.S. businesses that would be captured by this standard?

- In the context of geolocation data, the Discussion to the proposed rule mentions collection by mobile *mapping* applications, GPS services, and wireless communications providers. However, a far larger number of mobile applications (beyond *mapping* applications) collect a user's

geolocation data. Is this category of identifiable data intended to capture *any* such mobile applications that collect geolocation data that can be connected to an individual user? If so, what analysis did CFIUS perform of the potential number and types of U.S. businesses with such mobile applications that could be considered a TID U.S. business based on this prong of the definition of "identifiable data"? This would also add to the number of small businesses potentially impacted by the proposed rule.

Covered Investment – Access to "Material Nonpublic Technical Information"

9. Please explain what is meant by "not available in the public domain". Under the International Traffic in Arms Regulations, for example, the phrase "public domain" has a precise definition. Should practitioners use this definition in the context of Part 800 as well? If not, please provide alternative guidance for this concept.

10. Please clarify to what degree access to material nonpublic technical information must be connected to the investment itself for 800.211(b)(1) to be triggered. For example, if, during the due diligence phase for a proposed transaction, a foreign person is afforded access to material nonpublic technical information in the possession of the TID U.S. business, but post-transaction would not be afforded access to any such information, would this be considered a right specified in 800.211(b)(1)? Consider the following:

> **Example H**: Corporation A, a foreign person who is not an excepted investor, proposes to acquire a four percent, non-controlling equity interest in Corporation B, an unaffiliated TID U.S. business. As part of the due diligence for the proposed transaction, Corporation A was given access through a data room to material nonpublic technical information in the possession of Corporation B. Pursuant to the terms of the investment, however, Corporation A will not be afforded any additional access to material nonpublic technical information in the possession of Corporation B, or to any other rights specified in 800.211(b). Assuming no other relevant facts, the proposed transaction **[is][is not]** a covered investment.

Alternatively, if a foreign person is afforded access to material nonpublic technical information in the possession of the TID U.S. business pursuant to the terms of a separate agreement that it entered into at the same time as an equity investment, could the foreign person's access to such information under the terms of that separate agreement be imputed to the "investment" itself for purposes of the 800.211 analysis? If so, under what circumstances? For example:

> **Example I**: Corporation A, a foreign person who is not an excepted investor, proposes to acquire a four percent, non-controlling equity interest in Corporation B, an unaffiliated TID U.S. business. Corporation A will have no rights to access material nonpublic technical information in the possession of Corporation B, or any other right specified in Section 800.211(b), pursuant to the terms of the share purchase agreement. However, Corporation A will be afforded access to material nonpublic technical information in the possession of Corporation B pursuant to a separate business cooperation agreement that was entered into at the same time as, and as a condition precedent to, the equity investment under the share purchase agreement. Assuming no other relevant facts, the proposed equity investment **[is][is not]** a covered investment.
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> **Example J**: Same facts as in Example I, above, except that the business cooperation agreement, while negotiated around the same time as the share purchase agreement, is signed several months after the share purchase agreement was signed, has separate consideration from the share purchase agreement, and is not a condition precedent to, or conditioned on, the equity investment

under the share purchase agreement. Assuming no other relevant facts, the proposed equity investment **[is][is not]** a covered investment.

Incremental Acquisitions

11. Please clarify whether an incremental investment by a foreign person who is not an excepted investor in a TID U.S. business in which the foreign person already has rights specified in paragraphs (1), (2), or (3) of 800.211(b) or control rights is a covered investment and/or covered control transaction, if such incremental investment does not afford the foreign person any *additional* rights or access with respect to the TID U.S. business, but the Committee never reviewed – and thus never concluded action on – the foreign person's original investment into the TID U.S. business. This scenario arises often in our practice, and will arise more frequently as we enter the first few years under full FIRRMA implementation. While we have asked for clarity on this question in the Pilot Program context, we have not received a response. For ease of reference, please consider the following variations on *Example 4* under 800.303(f) and *Example 2* under 800.304(f):

> **Example K**: Corporation A, a foreign person who is not an excepted investor, acquired a four percent, non-controlling equity interest with board observer rights in Corporation B, an unaffiliated TID U.S. business, prior to FIRRMA being enacted. This transaction was not notified to the Committee. One year from now (after the new Part 800 regulations take effect), Corporation A proposes to acquire an additional five percent equity interest in Corporation B, which would result in Corporation A holding a nine percent, non-controlling equity interest in Corporation B. The proposed investment does not afford Corporation A any additional rights with respect to Corporation B, including the rights specified in 800.211(b). Assuming no other relevant facts, the proposed transaction **[is][is not]** a covered investment.
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> **Example L**: Corporation A, a foreign person who is not an excepted investor, acquired a 15 percent, controlling equity interest in Corporation B, an unaffiliated TID U.S. business, prior to FIRRMA being enacted. This transaction was not notified to the Committee. One year from now (after the new Part 800 regulations take effect), Corporation A proposes to acquire an additional five percent equity interest in Corporation B, which would result in Corporation A holding a 20 percent, controlling equity interest in Corporation B. The proposed investment does not afford Corporation A any additional rights with respect to Corporation B. Assuming no other relevant facts, the proposed transaction **[is][is not]** a covered transaction.

12. Please clarify how CFIUS will treat a U.S. business that becomes a "TID U.S. business" in the middle of a multi-tranche equity investment. For example, please consider the following scenario, which we encounter often in our practice.

> **Example M**: Corporation A, a foreign person who is not an excepted investor, signs an investment agreement for a two-stage non-controlling equity investment in Corporation B, an unaffiliated U.S. business. At the time the investment agreement is signed, as well as at the time of the closing of the first tranche, Corporation B is not a TID U.S. business. At the closing of the first tranche, pursuant to the investment agreement, Corporation A obtains the right to appoint a member of the board of Corporation B. The closing of the second tranche does not provide Corporation A any new rights with respect to Corporation B. However, by the time of the closing of the second tranche, Corporation B begins to manufacture a critical technology, thereby making it a "TID U.S. business." The closing of the second tranche **[is][is not]** a covered investment.

13. Please clarify to what extent CFIUS will communicate to the parties its assessment of the rights acquired by a foreign investor with respect to a TID U.S. business. Given that new covered transactions could arise due to a change in rights as compared to transactions on which CFIUS previously completed all action, it will be important for the parties to be aware of precisely which rights CFIUS bases its review upon. For example, if the parties were to stipulate that an investment involved a foreign person's access to material nonpublic technical information and involvement in substantive decisionmaking with respect to critical technologies of the U.S. business, but CFIUS were to conclude that the investment only involved access to material nonpublic technical information, would CFIUS inform the parties that it reached a different conclusion? If so, how and when? If not, why not, since the parties might (if CFIUS clears the transaction) then operate under the (false) assumption that they have "safe harbor" for involvement in substantive decisionmaking going forward?

Conversely, if the parties were to stipulate that an investment affords the foreign person involvement in substantive decisionmaking and is thus a covered investment under 800.211, but CFIUS instead concludes that the foreign person in fact has "control" rights, would CFIUS inform the parties that it reached this different conclusion? If so, how and when? (A brief reference in *Example 1* to 800.305 suggests that CFIUS will inform the parties when it concludes that a transaction is a "covered control transaction," but it would be helpful to provide a process for this in the proposed rule.) If not, why not? In this scenario, particularly if the parties had submitted a full notice, it would be important that they know that CFIUS is completing action on a covered control transaction, as that would confer safe harbor to the immediate transaction and all future incremental acquisitions pursuant to 800.305.

In all cases, we encourage CFIUS to be transparent with the parties when its assessment of rights differs from that which the parties describe or stipulate to in their filings.

Incremental Acquisition Rule / Safe Harbor

14. Please clarify what corporate arrangements, and corporate reorganizations (if any), would benefit from the revised "incremental acquisition rule" at 800.305 and/or "safe harbor" at 800.701. We note that the "incremental acquisition rule" at 800.305 has been revised from the current formulation at 800.204(e) to apply to additional interests acquired in a U.S. business over which the same foreign person "*or any of its direct or indirect wholly-owned subsidiaries*" previously acquired "*direct*" control in such U.S. business. Does this mean that incremental acquisitions by sister companies could benefit from the incremental acquisition rule? And if so, how does that relate to the current FINSA guidance that a corporate reorganization that results in a new foreign person obtaining control over a U.S. business is treated – technically – as a separate "covered transaction," even if the ultimate parent does not change?

Please consider the following:

> **Example N**: Corporation X, a foreign person, acquires a 20 percent interest and important rights in Corporation C, a U.S. business, through its direct, wholly-owned subsidiary, Corporation A. Corporation A and Corporation C file a voluntary notice of the transaction with the Committee. Following its review of the transaction, the Committee informs the parties that the notified transaction is a covered control transaction, and concludes action under section 721. Three years later, Corporation X acquires an additional 20 percent interest and additional (and unique) important rights in Corporation C through its direct, wholly-owned subsidiary, Corporation B, which is organized in a different foreign jurisdiction than Corporation A. Assuming no other relevant facts, this subsequent transaction **[is][is not]** a covered transaction.

> **Example O**: Corporation X, a foreign person, acquires a 20 percent interest and important rights in Corporation C, a U.S. business, through its direct, wholly-owned subsidiary, Corporation A. Corporation A and Corporation C file a voluntary notice of the transaction with the Committee. Following its review of the transaction, the Committee informs the parties that the notified transaction is a covered control transaction, and concludes action under section 721. Three years later, as part of a corporate reorganization by Corporation X, Corporation A transfers its 20 percent interest and important rights in Corporation C to Corporation B. Corporation B is directly wholly-owned by Corporation X and organized in a different foreign jurisdiction than Corporation A. Assuming no other relevant facts, this subsequent transfer **[is][is not]** a covered transaction.

Excepted Investors

The proposed rules regarding the excepted investor concept indicate that CFIUS intends a very narrow limitation on "covered investment" and "covered real estate transactions." Thus, we limit our comments on excepted investors to the following:

15. Please explain the rationale for requiring agreement of (only) two-thirds of CFIUS voting members to designate an "excepted foreign state" and to determine whether any such state has a "robust process" for FDI review and cooperation. Other than sending a split recommendation to the President, we are not aware of any other Committee-wide decisions that are taken by anything other than consensus.

16. Please confirm that if an excepted investor elects to waive its status as an excepted investor with respect to a particular transaction, it will not be deemed to have waived its excepted investor status with respect to any other transaction. It would be helpful to amend 800.220(e) to clarify this, for example:

> (e) A foreign person may waive its status as an excepted investor with respect to a transaction … In such case, the foreign person will be deemed not to be an excepted investor with respect to such transaction and the provisions of Subpart D or E, as applicable, will apply.

Investment Funds

17. We appreciate the commentary in the Discussion to the proposed rule, as well as in the Pilot Program FAQs, that the "specific clarification for investment funds" at 800.307 means that: (1) where all of the criteria in 800.307(a) are satisfied, a limited partner's membership on an investment fund's advisory board or committee does not, in and of itself, render the foreign person's indirect investment in an unaffiliated TID U.S. business a covered investment; and that (2) failure to meet all of the criteria in 800.307(a) does not necessarily mean that an indirect investment by the foreign person in a TID U.S. business through an investment fund is a covered transaction. Taken together, we conclude that the investment fund "clarification" neither expands nor limits CFIUS's authority to review any transactions involving an investment fund; and any such transactions must be assessed against the criteria for "covered control transactions" in 800.210 and "covered investment" in 800.211 – no more, and no less. **Please confirm that this conclusion is correct.**

18. Please clarify how the jurisdiction of formation of the investment fund itself impacts (if at all) whether a transaction is a covered transaction. For example:

> **Example P**: Investment Fund A is a limited partnership organized in the Cayman Islands. It is exclusively controlled by a general partner that is organized and has its principal place of business in the United States and that is not controlled by a foreign person. Investment Fund A has its registered address in the Cayman Islands but is otherwise a non-operational fund entity. All of the foreign limited partners in Investment Fund A satisfy the criteria of 800.307(a), but more than 50 percent of the limited partners of Investment Fund A are foreign or foreign-controlled entities. Pursuant to 800.221 and 800.225, Investment Fund A **[is][is not]** a foreign person. Investment Fund A making an investment in a TID U.S. business that affords Investment Fund A rights, access, or involvement specified in 800.211(b) **[is][is not]** a covered investment. Investment Fund A acquiring a controlling interest in a TID U.S. business **[is][is not]** a covered transaction.

19. Please clarify whether a foreign person having any one of the rights or powers discussed in 800.307(a)(4) with respect to an investment fund – irrespective of whether those rights involved the foreign person serving on an advisory board or committee of the fund – would be deemed to control the investment fund, thereby making the investment fund itself a foreign person. 800.307(a)(4) states that "*[t]he foreign person does not otherwise have the ability to control the investment fund, including without limitation the authority: (i) To approve, disapprove, or otherwise control investment decisions of the investment fund; (ii) To approve, disapprove, or otherwise control decisions made by the general partner, managing member, or equivalent related to entities in which the investment fund is invested; or (iii) To unilaterally dismiss, prevent the dismissal of, select, or determine the compensation of the general partner, managing member, or equivalent.*"

20. Please confirm that if the general partner, managing member, or equivalent of an investment fund is a foreign person, the investment fund itself is deemed a foreign person. We assume that, based on the definition of "control" and "foreign person," if the general partner is a foreign person, the investment fund itself would be deemed to be a "foreign person" (by virtue of the general partner's control of the fund); and therefore any controlling investment that the fund makes in a U.S. business (TID, or otherwise) is a "covered control transaction" and any investment that the fund makes that satisfies the criteria of 800.211 is a "covered investment." Please confirm that this has not changed.

21. Please clarify when, if ever, a general partner that is organized in the United States and owned and managed by U.S. nationals could nonetheless be deemed a "foreign person" due to its affiliation with a private equity group that is a "foreign person." We are increasingly seeing foreign-organized private equity groups that would likely be deemed to be a "foreign person" establish a U.S.-organized general partner, owned exclusively by one or more U.S. citizens who are partners in the private equity group, as a way to minimize the risk that CFIUS will have jurisdiction over investments made by any investment funds that the U.S.-organized general partner manages. Could such a general partner nonetheless be deemed by CFIUS to be a "foreign person;" and if so, what nexus between the general partner and/or the U.S. citizens that own it, on the one hand, and the foreign-organized private equity group, on the other hand, could lead to such a determination?

22. Please clarify the circumstances under which an investment fund is exempt from the mandatory filing requirement in 800.401(b) for certain covered transactions involving substantial foreign government interest. The exemption in 800.401(c) is taken straight from FIRRMA and included without explanation, commentary, or examples. But notably, this provision from FIRRMA appears to (1) exempt from mandatory filing requirements those investment fund investments that afford a

foreign limited partner any of the rights, access, or involvement that would constitute a "covered investment" (for example, access to material nonpublic technical information of the U.S. business), so long as the criteria in 800.401(c) are met; and (2) require few criteria if the investment fund has no advisory board or other committees on which foreign limited partners sit. Please confirm that this is the case. And to better understand the implications of this exemption, please provide guidance on the following hypotheticals:

> **Example Q**: Corporation A, a foreign person who is not an excepted investor and who is wholly owned by a foreign government, acquires 26 percent of the voting interest of the limited partners in Investment Fund B. Investment Fund B is organized in the United States and managed exclusively by a general partner that is not a foreign person. The investment confers to Corporation A membership on Investment Fund B's advisory board. Investment Fund B currently holds 100 percent of the ownership interests in an unaffiliated TID U.S. business. Corporation A obtains access to material nonpublic technical information of the TID U.S. business as a result of its participation on the advisory board, but Corporation A satisfies all of the criteria of 800.401(c)(3). Assuming no other relevant facts, this investment by Corporation A is a covered investment that results in the acquisition of a substantial interest in a TID U.S. business by a foreign person (Corporation A) in which a foreign government has a substantial interest[, and the parties to the transaction are required to submit to the Committee a declaration in accordance with 800.401(b)] ***or*** [; however, the submission of a mandatory declaration is not required because all of the requirements for exemption under 800.401(c) with respect to this transaction are satisfied.]
>
> **Example R**: Corporation A, a foreign person who is not an excepted investor and who is wholly owned by a foreign government, holds 49 percent of the voting interest of the limited partners in Investment Fund B. Investment Fund B has no advisory board or other committees of limited partners. Investment Fund B is managed exclusively by a general partner that is not a foreign person, but Investment Fund B is organized outside of the United States and more than 50 percent of the limited partnership interests of Investment Fund B are held by foreign or foreign-controlled entities. Investment Fund B now seeks to acquire 26 percent of an unaffiliated TID U.S. business and have an observer to the board of the TID U.S. business, which observer seat Investment Fund B plans to give (but is not compelled to give) to Corporation A to fill. Assuming no other relevant facts, this investment by Investment Fund B in the TID U.S. business **[is][is not]** a covered investment that results in the acquisition of a substantial interest in a TID U.S. business by a foreign person (Investment Fund B) in which a foreign government has a substantial interest[, and the parties to the transaction are required to submit to the Committee a declaration in accordance with 800.401(b)] ***or*** [; however, the submission of a mandatory declaration is not required because all of the requirements for exemption under 800.401(c) with respect to this transaction are satisfied.]

Lending Transactions

23. Please clarify whether new *Example 4* under 800.306 was intended to make any financing arrangement that confers to a foreign lender either "control" over any U.S. business, or the rights, access, or involvement in 800.211(b) in a TID U.S. business, a "covered transaction," *even if* such controlling or non-passive rights are characteristic for a typical loan. As currently written, it is not clear whether the "*not of a typical loan"* qualifier with respect to the rights from *Example 3* carries over into *Example 4*. If such a qualifier does not carry over, then *Example 4* seems to imply – quite surprisingly – that whether a loan is a covered control transaction depends only on whether *"[the lender] obtains control of [the borrowing U.S. business] as a result of the loan;*" and whether a loan is a covered

investment depends only on whether any of the rights in 800.211(b) are conferred to the lender – irrespective of whether such rights are characteristic of a typical loan. We assume this was not intended, so we suggest the following clarification for the text of *Example 4*:

> ~~Same facts as in Example 3 of this section, except that~~ Corporation A, a foreign bank, makes a loan to Corporation B, ~~is~~ an unaffiliated TID U.S. business. ~~and t~~The loan documentation extends to Corporation A~~'s~~ involvement in substantive decisionmaking with respect to Corporation B that is not characteristic of a typical loan. Whether the loan is a covered control transaction would depend on whether Corporation A obtains control of Corporation B as a result of ~~the loan~~ such substantive decisionmaking, but, if it could not result in Corporation A's control of Corporation B, this loan is a covered investment.

If, however, CFIUS intends to extend its jurisdiction to any lending arrangements that confer controlling rights or non-passive rights in 800.211(b) – even if such rights are characteristic of a typical loan, such as restrictive covenants on the amount of additional debt that the borrower may assume without the lender's approval – this would warrant further explanation in the proposed rule and consideration of the impacts of such a change on foreign lending transactions.

24. Please provide additional examples of "financial or governance rights characteristic of an equity investment but not of a typical loan." For example:

> **Example S**: Corporation A, a foreign person who is not an excepted investor, agrees to pay 10 percent of the expenses of Corporation B, an unaffiliated TID U.S. business. In exchange for, and for the duration that Corporation A pays such expenses, Corporation B agrees to pay Corporation A 10 percent of its revenues. Pursuant to the terms of the expenditure arrangement, a designee of Corporation A will have the right to observe the meetings of the board of directors of Corporation B, but Corporation A will not otherwise have any ability to determine, direct, or decide important matters affecting Corporation B. Assuming no other relevant facts, this arrangement **[is][is not]** a covered investment.

Mandatory Declarations – Substantial Foreign Government Interest

25. We were surprised to see that the proposed rule declined to establish any process for granting waivers to certain foreign persons of the mandatory filing requirement in 800.401(b) for certain covered transactions involving substantial foreign government interest, despite clear authority in FIRRMA to do so. Moreover, the proposed rule provided no explanation or commentary surrounding CFIUS's decision not to establish such a process. **Please explain (1) why CFIUS has not, at this time, established any process for granting such waivers; (2) whether CFIUS is working to establish such a process; (3) if not, why not; and (4) if so, (a) what is the expected timeframe for the establishment of such a process, and (b) what factors CFIUS is considering for how a foreign person can demonstrate a history of cooperation with the Committee and that its investments are not directed by a foreign government.**

26. Please clarify that the reference to "a foreign government" in the definition of "substantial interest" at 800.244 refers to a single foreign government, and not the collective interest that may be held by multiple separate foreign governments. Please also clarify whether CFIUS will potentially aggregate government interests across investors who do not themselves act in concert, if the interests are held by national or sub-national governments of a single foreign state.

"Parent"

27. We were surprised that CFIUS did not use the proposed rules as an opportunity to update the definition and/or examples for "parent." For at least the past 10 years, there has been an outstanding question as to whether CFIUS considers the general partner of a limited partnership to be a "parent" of the limited partnership; and who should be considered "parents" in the context of trusts, foundations, and other similar organizations that have settlors, beneficiaries, and trustees. The lack of clarity and formal guidance from CFIUS on who is a "parent" in these situations has led to disparate treatment among transactions, and among Treasury case officers, as to the required content of a notice and when sufficient information (e.g., personal identifier information) has been provided for a notice to be considered complete and ready for acceptance.

Under the proposed rules, the concept of "parent" takes on even more significance – necessitating additional clarity in the "parent" definition. For example, the concept of "parent," and the characteristics and conduct of such "parents," now factors into:

- who qualifies as an "excepted investor" (under 800.220(a)(3), each "parent" of a foreign entity must satisfy certain criteria for that entity to qualify as an "excepted investor"; and under 800.220(c)(1), certain conduct of any "parent" could disqualify an otherwise eligible investor) – and thus which foreign persons are exempt from "covered investment" and "covered real estate transactions"; and

- whether an entity holds a "substantial interest" (see 800.224(c)) – and thus which transactions involving investors with foreign government interest require a mandatory filing.

Please consider refining the definition of "parent" and/or its examples in the final regulations to provide this needed clarity.

"Party to a Transaction"

28. We note that, in the context of an acquisition of an ownership interest, the definition of "party to a transaction" (800.237(a)(1)) now includes three parties: the buyer, the seller, and now also the entity whose ownership interest is being acquired. **Please confirm whether all three parties must submit any required mandatory declaration, per 800.401(a) ("…the *parties to a transaction … shall submit* to the Committee a declaration …") –** or if this revised definition is meant simply to clarify that the U.S. business-side party can be either the target business itself *or* a separate entity selling its ownership interest in the U.S. business.

Declarations – Content and Process

29. Please clarify when, if parties submit a notice in lieu of a mandatory declaration, the parties' 30-day advance filing clock begins for purposes of when the transaction may be completed. At the time that a draft notice is submitted? At the time that a draft notice is submitted with party certifications? At the time that a formal notice is submitted with party certifications? At some other point in time? If the 30-day advance filing clock begins upon the submission of a "complete" notice, should "completeness" be presumed if CFIUS does not provide any comments on a draft notice?

30. Please clarify in each case what, if anything, happens to the 30-day advance filing clock if a submitted declaration and/or notice in lieu of a declaration is (a) deemed by the Staff Chairperson to be incomplete and thus not accepted, (b) rejected during the course of the assessment or review, or (c) withdrawn from assessment or review.

31. Please provide further guidance on the following topics pertaining to the declaration process and content:

- 800.406(e) prohibits multiple declarations pertaining to the same or a substantially similar transaction. Would this include multiple declarations from *multiple bidders* for the same target U.S. business? Also, would this include cases in which multiple foreign persons invest in the same U.S. business as part of the same investment transaction? If so, will the declaration form be formatted to allow multiple unrelated investors to provide information in the same declaration?

- Please provide a definition of "personally identifiable information" that should be used in the context of 800.404(c)(10). Should this be understood as the "personal identifier information" required from certain officers, directors, and individual shareholders under 800.502(c)(6)(vi)(B); "personal identifiers" as defined at 800.239; or something else?

- Please provide guidance on what is meant by "*all*" foreign government ownership in the foreign person's ownership structure, as required under 800.404(c)(18). Does this only refer to <u>direct</u> foreign government ownership? If so, of which entities in the ownership structure? Alternatively, would this also include <u>indirect</u> foreign government ownership? If so, of which entities in the ownership structure, and how far up each of their respective ownership chains?

<u>Notices – Content and Process</u>

32. In 800.503(b), please clarify what is meant by the phrase "or the Chairperson of the Committee has requested a notice pursuant to 800.501(b)". 800.501(b) refers to the process by which CFIUS requests that parties to a non-notified transaction file a notice. Why would the 45-day review period commence on the date that a filing has been merely requested (as opposed to received from the parties and accepted)?

33. We suggest that CFIUS use the new regulations as an opportunity to update Part 800 to address various inconsistencies and unclear requirements regarding the "contents of voluntary notices" at 800.502. **Please consider clarifying the following:**

- Throughout the "contents of voluntary notices," varying terms are used to refer to the foreign acquirer, including: "acquiring foreign person," "foreign acquiring party," "foreign person engaged in the transaction," "acquiring foreign person engaged in the transaction," "foreign person that is party to the transaction," "foreign party to the transaction," or just "foreign person." While the use of these different phrases typically does not cause an issue, it begs the question why so many variations of what appears to be the same concept were used, and may warrant a clean-up.

- Pursuant to 800.502(c)(6)(vi), personal identifier information (PII) and curriculum vitae (CVs) must be provided for, among others, "any individual having an ownership interest of five percent or more in the acquiring foreign person engaged in the transaction **<u>and</u>** in the foreign person's ultimate parent" (emphasis added). The "and" in this phrase raises the question of whether PII and CVs need only be provided for individuals who hold at least 5 percent at <u>both</u> levels, or if

PII/CVs need to be provided for any individual who holds at least 5 percent at either level. It also raises the question of whether PII/CVs must be provided for any individual holding at least 5 percent at intermediate levels.

- Pursuant to 800.502(c)(6)(iv)(A), the notice must describe whether a foreign government or a person controlled by or acting on behalf of a foreign government has or controls ownership interests, including contingent equity interests, of the acquiring foreign person or any parent of the acquiring foreign person. This has long begged the question whether this requires disclosure of only direct government or government-controlled ownership in the acquiring foreign person, or also indirect government or government-controlled ownership interest. And if indirect, through which entities in the ownership structure, and how far up each of their respective ownership chains? Various Treasury case officers, and various CFIUS Staff Chairpersons, have taken differing views on this question, causing disparate treatment among notices.

34. Finally, we request that the contents listed in 800.502 be the complete set of information that parties to a notice must provide in order for a notice to be deemed complete and ready for acceptance. If there are any other categories of information that Treasury case officers routinely request during the pre-filing phase, and without which such case officers will not deem the notice to be "complete," please include it in 800.502 so that the information requirements apply equally to all parties across all notices and parties can more efficiently prepare complete notices.

Agency Notices

35. For agency notices under 800.501(c)(ii) involving transactions on which CFIUS previously concluded action, please clarify whether the criteria in subpart (B)(2) are the same for pre-FIRRMA and post-FIRRMA transactions. Specifically, for transactions for which CFIUS concluded action on the basis of mitigation agreed or imposed pre-FIRRMA, must the material breach of such mitigation be "*intentional*" for CFIUS to now have the ability to re-open the review (which was the standard at the time such mitigation was agreed or imposed)? Would it matter whether the breach occurred pre- or post-FIRRMA?

PART 802

Treasury Tools

36. We welcome Appendix A's specific listings of military installations, operating areas, and counties involved with missile fields. These specific listings not only help to facilitate a jurisdictional analysis under Part 802, but also help to inform a "proximity" vulnerability analysis performed on U.S. businesses in the context of Part 800.

As we begin to use these listings for such analyses, we have discovered that identifying the precise "boundaries" of the Appendix A installations and operating areas is sometimes difficult based on open source information. It is thus difficult to conclude with any level of certainty whether particular real estate falls within one mile or 100 miles, as applicable, of such "boundaries."

Given that the U.S. government itself has the best knowledge of all "boundaries" (including any relevant coastlines) of each of the installations and operating areas in Appendix A, **Part 802 would benefit from a tool on the Treasury Department's CFIUS website that enables a user to input the geo-coordinates or physical address of a particular piece of real estate, and receive as an output the**

distance of such real estate from the nearest "boundary" of any of the Appendix A installations or operating areas within 100 miles. This would provide much greater clarity to parties in assessing CFIUS jurisdiction and as a result lead to more appropriate voluntary notifications to CFIUS.

Part 802 would also benefit from a dedicated real estate page on the Treasury Department's CFIUS website that contains, at a minimum, direct links to (and ideally, direct listings of) each of the other specific types of "covered real estate." This would include:

- a link to the most recent list of "large hub airports"
- a link to the most recent list of all "airports with annual aggregate all-cargo landed weight greater than 1.24 billion pounds"
- a link to the most recent list of "joint use airports"
- a link to the most recent list of "strategic seaports within the National Port Readiness Network" as identified by the Maritime Administration
- a link to the most recent annual report of the Bureau of Transportation Statistics in which the "Top 25 tonnage, container, or dry bulk ports" are listed.

It would also be useful to have direct links to:

- the last Census listing of urban clusters and urbanized areas
- the relevant sectors (e.g., 44-45, 72) of the most recent NAICS manual.

<u>"Miles"</u>

37. Please clarify that – unless a "nautical" mile is specified – the term "miles" refers to statute miles.

<u>Excepted Real Estate Transaction – Commercial Office Space</u>

38. An "excepted real estate transaction" includes "[t]he purchase or lease by, or concession to, a foreign person of commercial office space within a multi-unit commercial office building, if, upon the completion of the transaction, … (2) The foreign person and its affiliates (each counted separately) do not represent more than 10 percent of the total number of tenants in the building." 802.217(f)(2). **Please clarify how the number and percentage of tenants should be calculated.** Is it based on the number of *individuals* occupying the building, with the percentage resulting from the number of individuals affiliated with the foreign person who will occupy the building divided by the total number of individuals occupying the building; or based on the number of *persons* (individuals, entities, governments) who have signed leases, with the percentage resulting from the number of leases affiliated with the foreign person divided by the total number of leases in the building. For example, a foreign person that will have 100 of its employees occupy its leased space in a building that is occupied by 400 other employees from 9 other lease-holders would have 20 percent of the individuals in the building, but only 10 percent of the lease-holders. If the standard is individuals, please clarify CFIUS's expectation regarding the ability for a given tenant to have insight into the number of individuals working in a building in connection with other unaffiliated tenants.

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Thank you for your consideration of these comments on the Part 800 and Part 802 proposed rules. We hope these comments are useful as you continue to refine the proposed rules. We would welcome the opportunity to provide comments on Appendix A to the proposed rule at Part 800 if the time period for public comments on Appendix A is extended. We look forward to your responses on each of the points raised above.

Respectfully,

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